1958

Raymond B. Maxfield v. The Denver and Rio Grande Western Railroad Company : Brief for Appellant

Utah Supreme Court

In the

Supreme Court of the State of Utah

RAYMOND B. MAXFIELD,
Plaintiff and Respondent,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,
Defendant and Appellant.

Case No. 8854

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

The respondent, Mr. Maxfield, was injured on the 25th day of July, 1955, about eight miles west of Green River on U. S. Highway 50-6 at about three o'clock p. m. (R. 23).

He was a passenger in the rear of a railroad truck which was owned and operated by the appellant railroad. The driver lost control of the truck which tipped over. The respondent sustained injuries to his left shoulder. He was taken to the hospital at Price where he was an ambulatory patient for approximately eight days. He was under the

treatment of Dr. Hubbard who later testified as a witness in the case.

X-rays taken at the time of his injury showed that his left shoulder had been dislocated. It was placed back in position and his arm immobilized in a sling. After leaving the hospital he returned to his home at Green River. He was not confined to his bed but was ambulatory. During this time he drove his car from Green River to Price to keep appointments with Dr. Hubbard. He saw Dr. Hubbard for the last time a week before the 1st day of October (R. 29, 43).

He remained away from work from the 25th of July to the 1st of October. He saw the doctor approximately five or six times during this period. When he saw the doctor on the last occasion he told him that he was ready to go back to work.

One of the most important questions which arose in the case was whether or not the respondent was bound by the release which he executed. Prior to the date of signing the release the respondent had requested the claim agent to come to his home at Green River. There he had requested from the Claim Agent an advancement of $200.00, which advancement was paid to him. After he had been released by the doctor to return to work, he again visited the Claim Agent at the Claim Agent's office at Grand Junction and discussed with him the settlement of his case. At that time he states that the Claim Agent indicated a willingness to pay him the sum of $710.00 for a full release. However, he states that the only reason he signed this release was

because the Claim Agent told him that if he did not do so he would lose his employment. He also claims that the Claim Agent told him that if he attempted to get a lawyer and receive advice that he would lose his job. This was all denied by the Claim Agent and by Mr. Kanderis who was present with the Claim Agent during at least a part of these conversations. The respondent at no time testified to any facts or alleged facts which would indicate any basis for a mutual mistake of fact or for that matter, for a simple mistake of fact. His only excuse as determined from his testimony for being relieved from the release was alleged fraud on the part of the Claim Agent in allegedly forcing him to execute the release by a threat that if he did not do so or if he attempted to obtain legal advice he would lose his job (R. 48).

The respondent, immediately following the execution of the release, returned to his employment and has worked steadily ever since said time and was working at the time of trial.

The appellant in effect admits its negligence and admitted that the respondent was engaged in interstate commerce at the time of his injuries. The only question before the jury was the validity of the release, and assuming that the release was valid, the extent of respondent's injury and damages.

In support of the issue of damages, the respondent called as his only witness, not the doctor who had treated him, but Dr. Clegg who had been employed by his counsel to examine him for the purpose of testifying as a witness

in the case. Dr. Clegg did not see the respondent until almost two years after his shoulder injury. His examination was confined to an examination of the left shoulder. This consisted of neurological tests and of x-rays. The doctor observed in the x-rays taken approximately two years after respondent's injury that there was a calcium deposit on the top of the left shoulder which he believed would cause a permanent partial disability of approximately ten percent measured at the left shoulder. This disability in its relationship to the whole person would amount to a disability of five percent or less. This disability was clearly related to the callous formation (R. 66, 71).

In examining the respondent neurologically and examining muscle tone and condition, he concluded that the left arm was being used normally in all respects (R. 69). He did state that the respondent did complain of some pain in the extremes of motion (R. 69). This callous formation, the doctor stated, affected the respondent's ability to move his left arm in the extremes of motion but not in the usual ranges of motion. It was the cause of the permanent partial disability.

The appellant called Dr. Hubbard who treated the respondent at the time of his injury until he was released to return to his employment. Dr. Hubbard has practiced for 30 years in the industrial area around Price and Helper, during which times he has specialized in general and traumatic surgery. He stated that the dislocated shoulder injury sustained by the respondent was relatively common; in fact, he has treated about ten a year during the 30 years he has practiced in Carbon County. He explained the na-

ture of the injury and stated that it was easily reduced and that the only reason he gave the respondent a sedative was to relax him so that the reduction would be made more simple.

He was kept as an ambulatory patient for the purpose of observation only, it being the practice to keep middle-aged persons who have received injury in a hospital for an observation period to prevent blood clots, congested lungs and other complications which sometimes accompany injuries (R. 109). He stated that placing a dislocated shoulder back into position is not very painful and is not complicated. He thought that the reduction had been very successful and that the respondent had made an uneventful and completely successful recovery (R. 110).

The doctor produced in court the x-rays which he had taken at the time of respondent's injury. He described a callous formation existing on the top of respondent's left shoulder and stated that such callous formations are common in people over 40, or even in their late 30s, and that it is in the nature of an arthritic change. He compared the x-rays taken by Dr. Clegg and the x-rays taken at the Price hospital and explained that the callous formation shown in Dr. Clegg's pictures was also present in the x-rays taken at the time of respondent's injury and that allowing for the difference in the developing of the x-rays and allowing for the angle at which the pictures were taken, the callous formation shown in the x-rays taken at the time of respondent's injury and the x-rays taken by Dr. Clegg two years later, were identical both in position and development (R. 112, 113).

The doctor stated that before he released the respondent to return to work he had him move his arms in all the different ranges of motion and explained that he could do so without disability of any kind. When he was released by the doctor to return to work he was not limited to light duty but was released for all-purpose duty (R. 114).

At the conclusion of the evidence, the respondent moved to amend the complaint, allegedly to conform the complaint to the proof in connection with the alleged evidence relative to a mutual mistake of fact. The court permitted this amendment over appellant's objection (R. 128).

The case was submitted to the jury on the court's instructions and the jury returned a verdict in favor of respondent in the sum of $5,540.00, less $710.00, the amount paid at the time a release was taken. Appellant made a motion for a new trial, which motion was denied. From the errors complained of and the denial of the court to grant appellant's motion for a new trial, the appellant takes this appeal.

STATEMENT OF POINTS RELIED ON

POINT I.

THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE QUANTUM OF PROOF REQUIRED TO SET ASIDE A RELEASE.

POINT II.

THE COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE RESPONDENT

TO AMEND AND IN INSTRUCTING THE JURY ON MUTUAL MISTAKE OF FACT.

(a) *It was error to permit respondent to cross examine Mr. Stephen beyond the scope of the direct examination and beyond the issues formulated in the case.*

(b) *The uncontradicted evidence fails to show that the parties to the release executed the release because of mutual mistake of fact.*

(c) *The undisputed evidence shows that respondent did not sustain a permanent disability as a proximate result of his injury.*

POINT III.

THE COURT COMMITTED REVERSABLE ERROR IN FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 7.

ARGUMENT

POINT I.

THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE QUANTUM OF PROOF REQUIRED TO SET ASIDE A RELEASE.

The appellant requested the court to instruct the jury that plaintiff had the burden of proving by clear and con-

vincing evidence that he was entitled to be relieved of the release which he had signed. The court after some consideration determined that the proper rule on the issue of quantum of proof was a mere preponderance of the evidence and so instructed the jury. To the court's failure to give appellant's request and to the court's instructions given on the question of quantum of proof, the appellant duly excepted. The issue here is simply which quantum of proof should be applied in a Federal Employers' Liability Act in the State of Utah.

This matter was before this court in *Kirchgestner* v. *Denver and Rio Grande Railroad Company,* decided May 17, 1950, 218 P. 2d 685. In that case plaintiff sought to recover damages for permanent and disabling injuries involving his lower back. Ten days after the alleged mishap he executed a release for $135.00. While plaintiff had been boarding a car, the grabiron which he grasped came loose, causing him to fall to the ground where he struck his back against a boulder. He felt no ill effects until the next day when his back hurt him and he consulted Dr. Smith at Salida. Dr Smith took X-rays which were negative and gave the plaintiff some pills for his nerves. Four or five days later after continued pain, the plaintiff saw a Dr. Fuller at the same hospital who assured him that he would be "all right." Thereafter, plaintiff saw the Claim Agent at Pueblo who called Dr. Fuller and received assurance that plaintiff was physically able to return to work. The Claim Agent asked the plaintiff if he was ready to return to work and received an affirmative reply. A release was thereupon executed which was in the exact form as the one before this

court. The plaintiff subsequently claimed he was unable to do his work and discontinued the same, alleging that his inability to work was caused by pain in his back. He was not working at the time of the law suit. The court instructed the jury on mutual mistake of fact and instructed the jury that it could set aside the release if it found a mutual mistake by a preponderance of the evidence.

The Supreme Court of the State of Utah in reviewing this assignment of error said in its first opinion:

> "We are unable to review this assignment of error because the defendant did not take an exception to the instruction given to the jury. (Citing cases.) Before leaving this matter, however, we think the following observation in regard to the nature and proof of a mutual mistake of fact may prove helpful in cases involving the setting aside of releases which may hereafter arise. * * * Since mutual mistake of fact consists of a belief by both parties that a certain fact exists whereas in reality it does not exist or is not true, both the belief of the parties in the supposed true fact and existence of the true fact must be proved by the same degree of proof. The mistake is a unit circumstance. One of its prongs cannot be proved by a mere preponderance of evidence and other by clear, unequivocal and convincing evidence. Hence in a jurisdiction requiring mutual mistake of fact to be proved by clear, unequivocal and convincing evidence, (which the author of this opinion thinks is required in this jurisdiction) if there is no doubt that both parties contracted in the light of a belief that a certain situation or condition was true and it is claimed by one party that their belief was in fact a mistaken belief, the latter must prove by clear, unequivocal and convincing evidence that the situation or condi-

> tion in reliance on which the contract was made, was at the time of making thereof different from that which both parties supposed or believed. And if a jury is to determine whether the true fact is in reality different from what the parties mutually believed, such jury must find that fact by clear unequivocal and convincing evidence, and should be so instructed."

The court, however, did not reverse the case until it was subsequently heard on petition for rehearing, reported in 233 P. 2d 699 under date of June 19, 1951. Justice Wolfe in writing the unanimous opinion said:

> "The appellant's petition for rehearing was granted in this case to allow us to consider on its merits the question whether the trial court erred in denying the appellant's request that the jury be instructed that in order to avoid the release executed by the respondent, he must prove a mutual mistake of fact by 'clear and unequivocal' evidence. Instead, the court charged the jury that a mutual mistake of fact need only be proved by a 'preponderance of the evidence.' For the facts of the case, see our original opinion, Utah, 218 P. 2d 685.
>
> "Upon the authorities cited in our opinion granting the petition for rehearing, Utah, 225 P. 2d 754, we conclude that the lower court erred in the particular above mentioned and that such error necessitates a reversal of the case for a new trial. It would serve no useful purpose to further discuss those authorities here."

And again:

> "We had occasion recently to examine the expression, 'clear and convincing' evidence. See

Greener v. *Greener*, Utah, 212 P. 2d 194, 205. There we remarked that 'for a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. A mind which was of the opinion that it was convinced and yet which entertained, not a slight, but a reasonable doubt as to the correctness of its conclusion, would seem to be in a state of confusion.'

"Further, we said, 'That proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable to the mind.' See *Southwestern Bell Telephone Co.* v. *City of San Antonio, Texas*, D. C. Texas, 4 F. Supp. 570, 573, where it was stated that proof is not 'clear and convincing' if the court entertains a reasonable doubt.

"It is pointed out by the respondent that in the federal cases relied upon by us as authority for holding the trial court in error, the juries were required to find mutual mistake by 'clear and convincing' evidence and not by 'clear and unequivocal' evidence. Respondent argues that the word 'unequivocal,' imposed upon him a greater burden than do the words, 'clear and convincing,' and hence the lower court was justified in rejecting the appellant's requested instruction. While perhaps it would be the better practice in cases brought under the Federal Employers' Liability Act, 45 U. S. C. A. 51 et seq., to instruct in the terms employed by the federal courts, the use of the word 'unequivocal,' is not erroneous. The dictionary definition of the word, 'unequivocal,' is as follows: 'Not doubtful; not ambiguous; clear;

> sincere.' Thus if the word unequivocal means not doubtful, not ambiguous or clear as employed in this context, that term cast no burden upon the respondent which was not already upon him by virtue of the word 'clear.' We believe the Federal rule requiring 'clear and convincing' evidence is preferable."

It should also be noted that Instruction No. 2.6 of Jury Instruction Forms for Utah cites the *Kirchgestner* case as authority for the following instruction:

> *"BURDEN OF PROOF IN AVOIDING RELEASE*
>
> "Concerning the release, Exhibit A, which (if you find that it) was voluntarily signed by plaintiff for a valuable consideration under such circumstances that the parties understood that a release was being agreed upon, it would be binding upon the plaintiff, and constitute a complete defense to this action. The burden of proving the invalidity of the release is upon the plaintiff. In order to avoid its effect (he) must establish its invalidity by a degree of proof somewhat higher than the preponderance or greater weight of the evidence heretofore defined and which is applicable to other issues in this case. Before the release may be avoided he must establish by evidence that is clear and convincing that at the time of signing it he did not comprehend the nature of the release and its consequences (or that his will was overcome by duress or undue influence)."

The court in its first opinion, in the *Kirchgestner* case, *supra,* referred to *Callen* v. *Pennsylvania Railroad,* 332 U. S. 625, 68 S. Ct. 296, wherein the Supreme Court of the United States had considered a question of release. The Supreme Court of Utah construed that case as holding in

conformity with its opinion requiring clear and convincing evidence to set aside a release.

The *Callen* case arose under the Federal Employers' Liability Act. Plaintiff complained of a severe and permanent back injury. Defendant took a release from the plaintiff similar to the one in the instant case for $250.00. At the trial plaintiff did not claim fraud but testifed he signed a release in reliance on the Claim Agent's assurance that "there was nothing wrong" and that he "could get back to the job." At the trial it appeared from his testimony that both he and the Claim Agent were mistaken; that he in fact had a permanent and serious injury and could not work. The trial court instructed the jury as follows:

> "The release, as I have told the attorneys for both sides, I do not consider binding insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured * * *."

The Circuit Court of Appeals in the Third Circuit reversed the case on the grounds of this instruction and the Supreme Court of the United States in commenting on said fact said:

> "The Circuit Court of Appeals, quite rightly we think, construed the charge of the District Judge as withdrawing the question of validity of the release from the jury and said: 'This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanancy of the injuries.' "

The Court then stated as follows:

> "We are urged, however, to decide in this case that the release was properly disregarded by the trial court upon the ground that the burden should not be on one who attacks a release, to show grounds of mutual mistake or fraud, but should rest upon the one who pleads such a contract, to prove the absence of those grounds. It is not contended that this is or ever has been the law; rather, it is contended that it should be the law, at least as to railroad cases."

The Court, however, in refusing to change the law as it then existed, said:

> "If the Congress were to adopt a policy depriving settlements of litigation of their prima facie validity, it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted."

The United States Supreme Court finally, by majority opinion, sustained the Third Circuit in the *Callen* case with four judges dissenting. The dissenting judges were Black, Douglas, Murphy and Rutledge. These four thought that the case should be reversed and that the railroad should have the burden of proving that the release was not obtained by fraud or that there was not mutual mistake of

fact. This is the present rule in admiralty cases. Two of the dissenting judges are now deceased.

The Third Circuit, which was sustained in the *Callen* case, *supra*, specifically held on the question quantum of proof as follows:

> "Prior to charging appellant's points above quoted, the District Judge had advised the jury that the release was not binding in so far as it applied to appellee's permanent injuries. This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries. Thereafter, in charging appellant's points, though the Judge made a conscientious effort to remedy the situation, he failed to tell the jury that clear and convincing evidence of mutual mistake of a material fact was needed in order to set the release aside. That type of instruction was especially important in view of the confusion which had been created over the status of the release. Had a point for charge covering this been among the fourteen submitted on behalf of the appellant, it probably would have solved the difficulty, but the failure to suggest such point does not excuse the omission from the charge of the law of that phase of the case which should have been charged of the court's own motion."

It thus is clear that the *Callen* case clearly approved the type instruction requested in the instant case. It is also clear that the Utah Supreme Court has done likewise in the *Kirchgestner* case, which is cited herein.

The respondent in effect is urging that the trial court in the instant case should overrule the United States Su-

preme Court and the Utah Supreme Court because of the *Dice* case, *infra*, and two subsequent Federal Circuit Court cases. A consideration of these cases does not justify plaintiff's contention.

In *Dice* v. *Akron, Canton & Youngstown Railroad Company*, decided by the United States Supreme Court in 1951, the facts were as follows:

The plaintiff, a railroad fireman, was seriously injured when the engine jumped the track. The defendant plead a release for $924.63. The plaintiff claimed fraud in the inducement to the execution of the release. The jury awarded $25,000 to plaintiff. The Ohio trial court set the verdict aside, holding that (1) Ohio, not Federal law controlled, and (2) under the law petitioner was bound by his release even though he had been induced to sign by false statements, and (3) under Ohio law the factual issues involving a release should be decided by the court. The case went to the Ohio Supreme Court which sustained with one judge dissenting. The United States Supreme Court granted certiorari. That court said:

> "We granted certiorari because the decision of the Supreme Court of Ohio appeared to deviate from previous decisions of this Court that federal law governs cases arising under the Federal Employers' Liability Act. 342 U. S. 811, 72 S. Ct. 59."

On the second question the court said:

> "We hold that the correct federal rule is that announced by the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court—a release of rights under the Act is void when the employee is induced to sign it by

> the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release."

On the third question the court said:

> "The trial judge and the Ohio Supreme Court erred in holding that petitioner's rights were to be determined by Ohio law and in taking away petitioner's verdict when the issues of fraud had been submitted to the jury on conflicting evidence and determined in petitioner's favor."

The court then reversed and remanded the case, with four judges dissenting.

It will be noted that the majority of the court made no mention of the problem involving the question of quantum of proof, even though the Ohio Supreme Court referred to the problem in its opinion and said:

> "With respect to the burden of proof on this question in the federal courts, it may be observed that in the *Callen* case, the Circuit Court of Appeals, in reversing the District Court, stated that 'evidence in order to void the release, had to be clear, unequivocal, and convincing.' 3 Cir., 162 F. 2d 832-833. This is the precise rule with respect to burden of proof adopted by the trial judge in his finding in the instant case. The decision of the Circuit Court of Appeals in the *Callen* case was affirmed by the Supreme Court of the United States."

The four dissenting judges dissented on questions not material to the point here considered. During the course of their dissent they said:

> "Such proof of fraud need be only by a preponderance of the relevant evidence. See *Union Pa-*

cific Railroad Company v. *Harris*, 158 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003."

We have read the opinion in the *Union Pacific* case and are unable to find anything therein which even remotely deals with the question here at hand.

Finally the dissenting judges said:

> "Moreover, we cannot say with confidence that the Ohio trial judge applied the Federal standard correctly. He duly recognized that 'the Federal law controls as to the validity of a release pleaded and proved in bar of the action, and the burden of showing that the alleged fraud vitiates the contract or compromise or release rests upon the party attacking the release.' And he made an extended analysis of the relevant circumstances of the release, concluding, however, that there was no 'clear, unequivocal and convincing evidence' of fraud. Since these elusive words fail to assure us that the trial judge followed the Federal test and did not require some larger quantum of proof, we would return the case for further proceedings on the sole question of fraud in the release. 72 S. Ct. 312."

It must be assumed that the majority of the court did not agree with the four dissenting judges on this point. Also, it must be assumed as axiomatic that dissenting opinions are not the law.

During oral argument on appellant's motion for a new trial, counsel for respondent cited to the court two Federal decisions which were decided subsequent to the *Dice* case. The first was *Purvis* v. *Pennsylvania Railway Company*, 198 F. 2d 631. This case arose in Pennsylvania. Plaintiff

sustained injuries consisting of a bruised rib and nose laceration. He signed a release for $45.00. He claimed mutual mistake of fact and fraud in the inducement. The jury found that plaintiff did not know what he was signing and gave a verdict for $1,000.00. The Third Circuit in reviewing the case took upon itself the collateral and moot issue of the quantum of proof required to set aside a release. The court said:

> "We are satisfied that if and when the problem is squarely before the Supreme Court the rule pronounced will be in accord with Mr. Justice Frankfurter's above quoted language and therefore, in fairness to the district judges of this circuit and to ourselves, we adopt that test for this circuit in applicable instances."

In *Camerlin* v. *New York Central Railroad Company*, 199 F. 2d 698, the lower court in New York granted a summary judgment for defendant on a release case brought under the F. E. L. A. The case was appealed to the First Circuit where the case was reversed. In rendering its opinion the First Circuit said:

> "In support of the judgment below, the defendant relies particularly upon *Rader* v. *Lehigh Valley R. R. Co.*, 3 Cir., 1928, 26 F. 2d 73, and *Merwin* v. *New York, New Haven & Hartford R. R. Co.*, 2 Cir., 1933, 62 F. 2d 803. These cases bear considerable factual resemblance to the case at bar. In the *Rader* case, the appellate court sustained the trial judge in directing a verdict for the defendant, and in the *Merwin* case the appellate court reversed a judgment for the plaintiff on the ground that a verdict for defendant should have been directed. But in each the court was applying the older rule that a

> release cannot be avoided except upon evidence which is 'clear, unequivocal, and convincing.' This may have been the rule at one time but, at least as applied to cases under the Federal Employers' Liability Act, we take the federal rule now to be, as was indicated in the recent case of *Purvis* v. *Pennsylvania R. R. Co.*, 3 Cir., 1952, 198 F. 2d 631, that it is enough if the employee establishes, by a preponderance of the relevant evidence, the facts invalidating the release."

It will be noted that the opinion relating to quantum of proof in the *Camerlin* case was itself unnecessary to the opinion and therefore little more than *dicta.* Furthermore, the opinion it relies on to establsh the rule, viz., in the *Purvis* case, is obviously dicta. Finally, the dicta in the *Purvis* case follows the dicta in the *minority* opinion in the *Dice* case, *supra.*

Against the minority opinion in the *Dice* case, and the subsequent dicta opinions in the two Circuit Court cases cited herein, stands the majority and unoverruled opinion of the United States Supreme Court in the *Callen* case and the unanimous unoverruled decision in the Utah Supreme Court in the *Kirchgestner* case, all of which cases are considered herein.

POINT II.

THE COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE RESPONDENT TO AMEND AND IN INSTRUCTING THE JURY ON MUTUAL MISTAKE OF FACT.

(a) *It was error to permit respondent to cross examine Mr. Stephen beyond the scope of*

the direct examination and beyond the issues formulated in the case.

The issues framed by the parties in their pleadings and by the pretrial order limited the question on the release to the matter stated in respondent's Reply to the Amended Answer which is as follows:

> "Defendant obtained said release and settlement from plaintiff by threatening plaintiff with the loss of his job if he refused to accept said settlement; that said representation by defendant was false and that plaintiff relied on said representation; * * *."

During the examination of both respondent and the witness Stephen, this was the only issue considered. However, on cross examination of Mr. Stephen, Mr. Roberts immediately digressed from the issue and said:

> "Q. And you know the measure of damages which should be paid under the law, don't you?
>
> "A. No.
>
> "Mr. Ashton: Wait just a minute please. If the court please, we object to what the measure of damages is. In this case there is only one question, whether or not he fraudulently misrepresented what this man stated.
>
> "Q. (By Mr. Roberts) You know that one of the elements is pain and suffering, don't you?
>
> "Mr. Ashton: Object to that, if the Court please, as incompetent, irrelevant and immaterial. The only question here is whether or not a false misrepresentation was made."

This objection was overruled and Mr. Roberts then at some length asked the witness about pain and suffering, loss of bodily function, loss of earnings, both past and future and related matters which had no possible probative value on the issue of alleged fraudulent misrepresentation. How the matters related by Mr. Roberts' cross-examination could possibly bear on this issue is beyond counsel's comprehension. Such matters do relate to possible mutual mistake of fact.

(b) *The uncontradicted evidence fails to show that the parties to the release executed the release because of mutual mistake of fact.*

Even if mutual mistake of fact had been plead, the foregoing evidence has only a *possible* relevancy. That possibility depends upon whether or not there is probative evidence which proves or tends to prove there was a mutual mistake of fact *upon which both parties relied.*

This proposition of law is stated in the *Kirchgestner* case, *supra*, wherein the Utah Supreme Court said:

> "Since mutual mistake of fact consists of a belief by both parties that a certain fact exists whereas in reality it does not exist or is not true, both the belief of the parties in the supposed true fact and existence of the true fact must be proved by the same degree of proof. The mistake is a unit circumstance. One of its prongs cannot be proved by a mere preponderance of evidence and other by clear, unequivocal and convincing evidence. Hence in a jurisdiction requiring mutual mistake of fact to be proved by clear, unequivocal and convincing evidence, (which the author of this opinion thinks is

> required in this jurisdiction) if there is no doubt that both parties contracted in the light of a belief that a certain situation or condition was true and it is claimed by one party that their belief was in fact a mistaken belief, the latter must prove by clear, unequivocal and convincing evidence that the situation or condition in reliance on which the contract was made, was at the time of making thereof different from that which both parties supposed or believed."

The respondent stated that at the time he entered into the release he did so because he felt that if he did not do so he would lose his job. *This was his reason* for signing the release. No one claims that this was a mutual mistake of fact. To the contrary, it was claimed that this was a fraudulent misrepresentation, which by its very terminology eliminates mutual mistake of fact. The respondent stated that he was ready to go back to work and that the doctor had released him for that purpose. He did not claim that anyone was mistaken in this regard; in fact, he continued to work steadily for over two years and was working at the time of trial. Therefore, this could not constitute a mistake of fact, let alone a mutual mistake. But, even should we assume that the respondent was mistaken as to the facts of his injury, where is the evidence that the railroad was mistaken? The fact that Mr. Stephen knew or did not know that under the law a court or jury could award damages for lost wages, pain and suffering, loss of bodily function and so forth does not prove or tend to prove that the railroad was laboring under a mistake as to the

extent of respondent's injuries. The only questions put to Mr. Stephen relative to mistake were the following:

> "Q. And as a matter of fact when you made this settlement, you didn't know and you felt—Strike that. At the time you made this settlement it was your idea that he had no permanent disability, wasn't it?
>
> "A. As far as I know that is right.
>
> "Q. Well, that was the basis you made the settlement on, wasn't it?
>
> "A. I made the settlement on the basis of the complete injuries."

How could any fact finder find from such evidence that this constituted mutual mistake of fact upon which the parties relied in making a settlement. The fact is, the foregoing testimony clearly shows there *was no mutual mistake upon which the parties relied.*

In the *Kirchgestner* case, *supra,* the claim agent called the doctor who advised that the plaintiff was all right and that he could go back to work. *Relying* on this, the claim agent and the plaintiff executed a release. Subsequent evidence indicated that the plaintiff was not all right and that he could not continue his work.

So far as the instant case is concerned, the claim agent settled the case relying on respondent's representation that he was ready and able to continue his employment. The undisputed evidence shows that this was not a mistake but was and is the fact. There was no discussion about permanent or temporary disability. The discussion allegedly

centered around false representations about employment and the effect of consulting a lawyer.

(c) *The undisputed evidence shows that respondent did not sustain a permanent disability as a proximate result of his injury.*

It is claimed by respondent that the alleged mutual mistake of fact related to the permanency of respondent's disability resulting from the pain and limitation of motion caused by a callous formation on the top of his left shoulder.

Dr. Clegg testified that respondent had a callous formation, as diagnosed from X-ray readings, on the top of his shoulder. *This,* and only this he believed, would cause a 10% permanent disability *measured at the shoulder.* This disability would be reduced to something less than 5% of the person, and would be minimal. He had not seen the patient until almost two years after the injury. The X-rays which he interpreted were taken almost two years after the incident. He had not seen X-rays taken at the time of the injury.

Dr. Hubbard testified on behalf of the appellant. He had treated respondent. He saw him on the day of his injury and placed his shoulder back into position. He also saw X-rays *taken that same day.* These X-rays, he reported, showed the callous formation referred to by Dr. Clegg in the same position and in the same stage of growth as the callous observed by Dr. Clegg in the *X-rays taken two years later.*

No doctor was called to refute this testimony. *It stands undisputed.* It therefore appears from the undisputed expert testimony that respondent's permanent disability, if

any, stems from a callous formation on his shoulder *which existed at the time he was injured,* and which therefore could not have been caused by his injury.

It is no answer to Dr. Hubbard's testimony to say that respondent's lawyers and the jurors can make a different interpretation of the X-rays than the expert witness. Counsel recalls that Mr. Roberts so advised the jury by arguing that an X-ray was like any other photograph and that they could make their own interpretation. This is not the law. The rule is well stated in *Wigmore on evidence, Vol. III,* page 192 as follows:

> "It follows that an x-ray photograph (of a condition of the human body, at any rate) should not be offered and shown to the jury *without the testimony* of a witness qualified to interpret."

In *Russell* v. *Borden's Condensed Milk Co. of Utah,* 53 Utah 457; 174 P. 633, the Utah Supreme Court passed on this question and said:

> "It is next contended that the court erred in admitting in evidence certain radiographs or x-ray photographs, showing the condition of plaintiff's hip and hip joint. It is insisted that the radiographs had a tendency to mislead the jurors who were merely laymen, and thus possessed no knowledge respecting the injuries to the bone or the hip or hip joint. If the radiographs had been introduced for the purpose indicated by counsel, there would be much force to their contention. A jury of laymen possessing no knowledge nor experience respecting the bones and injuries thereto might easily be misled by a mere x-ray photograph or radiograph by which at the best merely the outline of the bone can be shown. The radiographs were, however, not introduced for the purpose indicated by counsel. They

were used by the doctors in illustrating their evidence, and were fully explained, and were introduced in evidence only as affording a fuller and clearer understanding by the jury of the doctors' testimony respecting the condition of plaintiff's injured hip and hip joint. The court committed no error in receiving the radiographs for the purpose for which they were received and used."

Dr. Hubbard was a disinterested witness who had treated the respondent over a period of time to the respondent's complete satisfaction. He is not employed by the appellant but by the respondent's hospital association. His testimony with reference to the x-rays was not disputed. Such evidence cannot be disregarded. The rule is well stated in *In Re Miller's Will,* 90 P. 1002 at page 1006 as follows:

> "It is firmly established everywhere that, as a general rule, when a disinterested witness, who is in no way discredited by other evidence, testified to a fact within the knowledge of such witness, which is not in itself improbable, or in conflict with other evidence, the witness is to be believed, and the facts so given are to be taken as legally established. *Kavanagh* v. *Wilson,* 70 N. Y. 177; *Evans* v. *George,* 80 Ill. 51; *In re John Immel's Estate,* 59 Wis. 249, 18 N. W. 182."

POINT III.

THE COURT COMMITTED REVERSABLE ERROR IN FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 7.

Appellant requested the court to give Instruction No. 7 which was as follows:

> "You are instructed that one of the issues raised in this case is whether the release executed and given

by plaintiff to the defendant Railroad was obtained through alleged misrepresentations made by defendant's agent Stephens.

"In that connection you are to consider only the evidence relating to plaintiff's claim that defendant's agent represented that if plaintiff did not execute and deliver the release he would lose his job.

"You are not called upon to decide and must completely disregard and eliminate from your deliberations any consideration as to the adequacy or inadequacy, fairness or unfairness of the consideration paid for said release. The court holds as a matter of law that a valid legal consideration was paid for said release and the only question before you is whether said release was procured through misrepresentations as aforesaid." (R. 152).

The court refused to give the above instruction. Counsel particularly felt that an instruction similar to the one requested was applicable and pertinent to the case at hand because of the evidence which had been received over counsel's objection relating to elements which are ordinarily considered by fact finders in determining what is a reasonable amount to pay for one who has sustained injury. With such evidence before it, it was of course tempting for the jury to determine whether or not the amount agreed upon between the respondent and the appellant railroad in the release was a fair amount and an amount which they would have found had they been determining the case. This, of course, was not the issue. The issue which was originally framed was whether or not the respondent had been fraudulently induced to enter into the release and as subsequently amended whether or not there had been a mutual mistake

of fact. The jury should not have been permitted without instruction from the court to speculate about these facts and determine what they would consider a fair settlement for the injuries alleged.

The error became particularly apparent during the argument to the jury. Mr. Black on two occasions told the jury that they could find what was a fair amount in determining the issues in this case. We submit that this was a palpable error and deprived the defendant of a fair trial.

CONCLUSION

For the reasons given we submit that the court should reverse said case and order a new trial.

Respectfully submitted,

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